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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1994

NORMA I. ACEVEDO-VILLALOBOS, ET AL.
PETITIONERS

v.

HON. RAFAEL HERNANDEZ, ET AL.
RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONERS REPLY BRIEF

* JESUS HERNANDEZ SANCHEZ
COUNSEL OF RECORD AND COUNSEL FOR PETITIONERS
HERNANDEZ SANCHEZ LAW FIRM
1ST. FEDERAL BUILDING STOP 23
SUITES 806/810
SANTURCE, PUERTO RICO 00909
TELS. (809) 722-5813/5814/5819/5897
FAX: 725-1112

25 pp

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

FEDERAL RESPONDENTS QUESTION PRESENTED 2

PETITIONER'S REPLY AND ARGUMENTS

A- FEDERAL RESPONDENTS MAIN CONTENTION 2-6

B- OTHER ARGUMENTS MADE BY FEDERAL RESPONDENTS 7-20

C- HONORABLE SUPREME COURT'S EXPRESSIONS REGARDING A DISMISSAL OF A COMPLAINT 20-21

CONCLUSION 21

TABLE OF AUTHORITIES

FEDERAL CASES **PAGE**

Bankers Trust Co. Vs. Mallis

433 US 381 (1978) 15

Brower v. Inyo County, 817 F2d 540 (1987) 17

Firstier Mtge Co. V. Investors Mtge. Co.

498 US 269 (1991) 21

Griggs V. Provident Consumer Discount Co.,

459 US 56 (1982) 19

Osterneck v. Ernst and Whinney

489 US 169 (1989) 18

Paganis v. Blonstein

3 F3d 1067 (7th Cir. 1993) 4,5,6,9

Ruby v. Secretary of U.S. Navy

365 F2d 385 (9th Cir, 1966) 20,21

FEDERAL STATUTES **PAGE**

28 USC 1291 4,6,13,14,18,19,21

Rule 15 (a) of the Fed. R. Civ. P. 7,8,9

Rule 54 (c) of the Fed. R. Civ. P. 5

Rule 58 of the Fed R. Civ. P. 5

Rule 15 of the Supreme Court Rules 2,3

Rule 59 (e) of the Fed. R. Civ. P. 17, 18, 19

TREATISE

Moore's Federal Practice, 2d edition 1993 . 16,17,18,19

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PETITIONERS REPLY BRIEF

Comes now petitioners and most respectfully presents herein to this Honorable Court petitioner's Reply Brief with respect to federal respondents Brief in Opposition.

FEDERAL RESPONDENTS QUESTION PRESENTED

On November 1, 1994, petitioners' counsel of record received the Brief for the federal respondents in opposition to petitioners Petition for a Writ of Certiorari. The federal respondents brief in opposition presented the following question: "Whether the court of appeals correctly held that it lacked jurisdiction over the district court judgment dismissing the complaint, because petitioners' notice of appeal therefrom was untimely filed."

PETITIONERS REPLY AND ARGUMENTS[1]

A- FEDERAL RESPONDENTS MAIN CONTENTION

Federal respondents brief in opposition only makes

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[1] **Rule 15 (.6) of the Supreme Court Rules (28 U.S.C.A. Rule 15, 1993 Cumulative Annual Pocket Part) states in relevant part that "[a] reply brief addressed to arguments first raised in the brief in opposition may be filed by any petitioner, but distribution and consideration by the Court under paragraph .5 of this Rule will not be delayed pending its filing...."**

one (1) main contention and argument, as follows (see Fed. Respondents Brief, at page 7): "Petitioners urge review to resolve the circuit conflict noted by the court of appeals regarding the circumstances under which the dismissal of a complaint constitutes an appealable final decision, Pet. 20-33. **This case, however, is not an appropriate one in which to resolve that conflict, because it is clear that under any of the standards used by the court of appeals, the order dismissing petitioners' complaint would have been considered final and hence appealable, rendering petitioners' notice of appeal untimely."** (Emphasis supplied).

The above argument was first raised by the petitioners on their Petition for a Writ of Certiorari (see Pet., at pages 31 to 33, and 52), therefore we are precluded at this stage by Rule 15 (.6) of the Supreme Court Rules (see footnote 1 of this Reply Brief) to reargue on this matter. We reaffirm our contention that under the mayority view

adopted by the circuits, petitioners appeal would have been entertained on the merits. We will limit ourselves to indicate that in **Paganis v. Blonstein**, 3 F3d 1067 (7th Cir. 1993), the Seventh Circuit confronted, assessed and ruled regarding two (2) different separate document judgments entries as well as two (2) different memorandums opinion and orders. See **Paganis**, 3 F3d, at 1068 and 1069. The **Paganis** Court held in **1993**[2] among other things the following (3 F3d, at 1070 and 1071): "The dismissal of a complaint **does not end the litigation**..... **Therefore, if a [separate] judgment entry dismisses only the complaint, it is not a final judgment.... What the [separate] judgment entry must**

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[2] The conflicts in our case **are live issues of federal law (appellate jurisdiction and federal practice and procedure). The main issue in Paganis, supra, (whether a separate judgment entry which dismissed a complaint constitutes a final decision under 28 U.S.C. 1291) was decided on August 24, 1993.**

do is state that the plaintiffs are denied all relief.... " (Emphasis ours and in original).[3]

As a matter of fact, federal respondents brief in opposition failed to discuss in depth the applicable caselaw in order to explain and ground properly their contention that under any of the three (3) approaches and standards held by the circuits, petitioners notice of appeal would have been found untimely filed. For

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[3] **Rule 54 (c) of the Fed. R. Civ. P. mandates in relevant part that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." While Rule 58 of the Fed. R. Civ. P. requires mandatorily in relevant part that a decision of the district court shall state "that all relief shall be denied". (See Pet. App. H-1 to H-3). In this case, the district court's Opinion and Order and the separate document judgment (both dated and issued on the same day) did not complied with the mandatory requirements of Rules 58 and 54 (c) of the Fed. R. Civ. P., because neither of which stated that all relief was denied as to all parties and as to all the causes of actions.**

example, the petition for certiorari cited and quoted **Paganis v. Blonstein**, 3 F3d, 1067 (7th Cir. 1993), but the federal respondents omitted to cite and discuss the facts and holdings contained in **Paganis**, supra, in order to support their allegations.

Federal respondents **sub silentio** conceded and accepted petitioners arguments based on our legal reseach, analysis and summarization regarding the description of the three (3) conflicting views among the circuits (see Fed. Respondents brief, at pages 7, 8 and 9); and they also expressly conceded and accepted petitioners contention that the mayority view among the circuits (the Seventh, Ninth, Third, and Sixth) adopted the ruling that a mere dismissal of the complaint is not a final decision and/or final judgment for appeal purposes under 28 U.S.C. 1291. (See Fed. Respondents Brief, at page 8) There are in fact a five (5) circuit mayority view, instead of four (4). See Pet, at pages 22-24.

B- **OTHER ARGUMENTS MADE BY FEDERAL RESPONDENTS**

1- Federal respondents contended that it is unavailing petitioners argument that review by this Honorable Court is warranted to "address a purported circuit conflict on the issue of whether a plaintiff retains the right to amend a complaint once as a matter of course under Fed. R. Civ. P. 15(a) after the district court has granted a motion to dismiss." (See Fed. Respondents Brief, at page 10). Federal respondents argued that this issue of federal practice and procedure "is not present in this case". Id. The opinion of the court of appeals below addressed this issue in the following manner (Pet. App. A-15 to A-16): "Before deciding which, **if any**, of these three approaches to adopt, **we briefly explain the rationale underlying each**. The Seventh and Ninth Circuits have **held** that the dismissal of a complaint is not final and appealable because a motion to dismiss is not a "responsive

pleading".... **and thus a plaintiff still retains his or her right to amend once as a matter of course under Rule 15 (a) even after a motion to dismiss has been granted**...In **Elfenbein v. Gulf and Western Indus. Inc.,**..., the Second Circuit explained that the **split on this issue was based on the circuit's differing views on the right to amend a complaint under Rule 15 (a) once a motion to dismiss has been granted."** (Emphasis ours).

There is a split and square conflict on this issue of federal practice and procedure among the circuits. (See Pet., at pages 19, 33-36). In our case, the district court's Opinion and Order, as well as the separate judgment (both dated and issued on the same day), merely dismissed the complaint and granted only state respondents motion to dismiss. (See Pet. App. C-1 to C-10; D-1). State respondents did not filed an answer to the complaint, therefore, even after the district court had issued its Opinion and Order and separate judgment

granting only state respondents motion to dismiss and dismissing merely the complaint, petitioners retained their right to amend the complaint for the first time once as a matter of course under Rule 15 (a) of the Fed. R. Civ. P. (See **Paganis**, supra, 3 F3d, at 1072 and 1073; and see also Pet., at pages 34, 35 and 36).

2- Federal respondents alleged that the district court's dismissal of the Complaint was related to **all** parties and claims (and not just to the state defendants), because "the district court made clear that it had dismissed **the entire complaint** as it related to all parties." (Emphasis ours) (See Fed. Respondents Brief, at Page 10, footnote 5). They also alleged that "[i]n dismissing the complaint, the district court entered a separate judgment **granting the pending motion to dismiss**...."[4] Id., at page 8. (Emphasis ours). They also

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[4] The phrase "**the pending motion to dismiss**", refers to federal

alleged that the separate judgment dismissed petitioners' "entire complaint". Id., at 3. **Today, on November 1994, federal respondents avers that the district court below dismissed the entire complaint as to all parties, but on February 26, 1993, the federal respondents filed a motion within the district court requesting, among other things, and we quote, that "the case against them should be dismissed."** (Pet., at pages 15 and 16, and footnote six (6)).

As acknowledge by the court of appeals below in its opinion, petitioners filed a complaint on July 15, 1992 which contained multiple parties (state respondents and

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respondents motion to dismiss filed within the district court on January 11, 1993, entered on the civil docket on January 13, 1993 (See Pet. App., at page G-3 and G-4). The district court's Opinion and Order and the separate document judgment (both dated and issued on January 15, 1993) does not make an express or implied reference to federal respondents motion to dismiss. See Pet. App., C-1-C-10, D-1.

federal respondents) and multiples causes of actions. See Pet App., A-7, footnote 2; and A-7 to A-8. The district court's separate judment dated January 15, 1993 (see Pet. App. D-1), did not granted federal respondents motion to dismiss; and did not used the phrase "the entire complaint is dismissed". The district court's opinion and order did not used the phrase " the entire complaint is dismissed". The federal respondents completly and clearly erred in concluding that the separate judgment contained an express or implied statement granting federal respondents motion to dismiss; and erred in concluding that the separate judgment dismissed the entire complaint.

The district court's separate judgment clearly indicates that said judgment was grounded, issued and based **solely** on the district court's opinion and order: "**By virtue of the Opinion and Order of the Court**, entered on this date,... plaintiffs' complaint is DISMISSED...." (See

Pet. App. D-1). In turn, the district court's opinion and order dated January 15, 1993 (see Pet. App., at page C-1; C-9 to C-10), **only granted state respondents motion to dismiss**, and merely dismissed the complaint without dismissing the causes of actions. For example, the district court assessed and discussed petitioner's Due Process claim (cause of action) **only in the following manner** (Pet. App., at C-6): **"Plaintiffs allege that they are career employees but fail to cite to any state law provision providing such a property interest. See Complaint paragraph 2."** This quoted statement made by the district court in its opinion and order, is the only discussion and assessment made by the district court regarding petitioners Due Process Claim (cause of action) contained in the original complaint. Does the above quoted statement made by the District Court in its opinion and order dated January 15, 1993, constitutes a final decision dismissing petitioners Due Process cause

of action? **We think not.** Therefore, the district court's opinion and order and separate judgment did not dismissed petitioner's complaint **as to all parties and claims**, consequently, it did not constituted the final decision and/or final judgment within the meaning of 28 USC 1291, and was not appealable. In addition, the district court and the court of appeals below did not considered and assessed at all one (1) of the claims contained in the original complaint. (See Pet. at pages 9, 13, 14 and 48).

The opinion of the court of appeals below failed to evaluate and consider the district court's opinion and order dated January 15, 1993, in determining whether the separate judgment dated January 15, 1993 constituted the final decision under 28 USC 1291.[5]

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[5] **The separate judgment was issued and grounded by virtue of the Opinion and Order of the D.C. having both the same date. See Pet., App. D-1.**

Federal respondents brief in opposition states that: "[a] s the court of appeals noted (Pet. App. A11 n.3), the district court's declaration that petitioners' motion for an extension of time to reply to the United States' motion to dismiss was moot, made it apparent that the complaint had been dismissed in its entirety." (See Fed. Respondents Brief, at page 9, footnote 4). **This statement and conclusion made by federal respondents is completly misleading**. The opinion of the court of appeals below did not make reference **at all** to the district court's Order dated March 3, 1993, declaring moot petitioners motion for an extension of time to reply to the United States motion to dismiss. As mentioned before, the opinion of the court of appeals below failed to consider and assess the district court's record in determining whether a mere dismissal of a complaint constitutes a final judgment and/ or final decision under 28 USC 1291. This is contrary to this

Honorable Court's holding in **Bankers Trust Co., vs. Mallis**, 433 US 381, 385, 386 (1978). See Pet., at pages 42-45.

It is important to note that the district court's Opinion and Order dated January 15, 1993 (the separate judgment was also dated january 15, 1993, and said judgment was issued and grounded by virtue of the Opinion and Order dated January 15, 1993) invited and induced petitioners to file their first amended complaint (**which constituted an implied grant of leave to amend**), when it stated the following: "**It is unfortunate that although the defendants' conduct may in fact be actionable, the Court has not been put in a position to even begin to evaluate the alleged constitutional violations.**" See Pet. App. C-9. Because the district court invited petitioners to file their first amended complaint, and because the district court's opinion and order and separate judgment dismissed only the complaint without

dismissing the causes of actions, grounded on the insufficiency of the statements of facts as to who did what to whom and why, then it follows that the district court did not intented its Opinion and Order and separate judgment to constitute the final decision and/or final judgment for appeal purposes under 28 USC 1291, and hence they were unappealable. This conclusion is further supported by the fact that the case at hand involved **multiple parties** and multiple causes of actions, and that the district court's Opinion and Order and separate judgment did not dismissed the complaint **as to all the parties**, and did not dismissed **all the causes of actions**. Professors Moore and Wright, both coincide and are in accord that in cases dismissing only the complaint involving multiple parties and claims, a district court's dismissal of a complaint must be unequivocal and must dismiss the complaint **as to all parties and claims**. See 9 Moore's Federal Practice, section 110.13 [1], at pages

111-113, 2d. edition 1993 ("If the action involves multiple claims or multiple parties and the order disposes of one or more but fewer than all of the claims or disposes of the claims and defenses of one or more **but fewer than all the parties, it is not immediately appealable** absent entry in accordance with the provisions of Rule 54 (b) or unless it fits within one of the practical finality doctrines.") See also Wright, Miller and Cooper, Federal Practice and Procedure, 2d edition 1993 (specific citations omitted). See also **Brower v. Inyo County**, 817 F2d 540,542 (9th Cir. **1987**) ("In an action involving multiple defendants, **the dismissal of the complaint only**, without dismissal of the action, **is not a final judgment.**").

3- Federal respondents, as well as the court of appeals below, concluded as a matter of law that after the district court had issued its Opinion and Order and separate judgment, the petitioners filed within the district court a motion under Rule 59 (e) of the Fed. R. Civ. P.,

which tolled the time for filing the notice of appeal. (See Fed. Respondents Brief, at pages 3, 4 and 5; and see the opinion of the court of appeals below, Pet. App., at pages A-12, A-13 and A-25). In our opinion, federal respondents and the court of appeals below erred in concluding that petitioners motion requesting leave to amend the complaint filed on February 1, 1993, constituted a Rule 59 (e) motion which tolled the time to file the notice of appeal. It is very important to point out that the February 1, 1993 motion requesting leave to amend was accompanied by a Memorandum of Law in Support to Amend Complaint and by a proposed amended complaint. See Pet. at pages 15.

This Honorable Court has held that a Rule 59 (e) motion can only be made from a final judgment and/or a final decision for appeal purposes under 28 USC 1291. See **Osterneck v. Ernst and Whinney**, 489 US 169, 173-174 (1989). Professor Moore has clearly indicated that a

Rule 59 (e) motion " suspends the **finality of the judgment** for purposes of appeal..." (See 6A Moore's Federal Practice, section 59.12, at 59-259 and 59-262, 2d edition 1989.). In the case hand, because the January 15, 1993 separate judgment and Opinion and Order did not constituted a final decision and/or final judgment for appeal purposes under 28 USC 1291, then it follows that petitioners motion requesting leave to amend filed on February 1, 1993 (see Pet, at page 15, 53-54) cannot be considered a Rule 59 (e) motion that tolled the appeal clock. There was nothing to toll on January 15, 1993, because the district court had not yet issued a final judgment and/or a final decision within the meaning of 28 U.S.C. 1291. **An unappealable order or judgment does not divest the district court of jurisdiction**. See **Griggs v. Provident Consumer Discount Co.,** 459 US 56 (1982), at page 58. Therefore, the final judgment and/or final decision under 28 USC 1291 occurred either on

March 3, 1993 (see Pet., at pages 53-54), or on April 19, 1993 (see PEt., at pages 52-53).

C- **HONORABLE SUPREME COURT'S EXPRESSIONS REGARDING A DISMISSAL OF A COMPLAINT**

Most respectfully, we finalize this Reply Brief by quoting recent expressions made by this Honorable Court which we believe favors the ruling that a mere dismissal of a complaint does not constitutes a final decision and/or final judgment within the purview of 28 U..S.C. 1291: "In our view, this interpretation of Rule 4 (a) (2) best comports with its drafters' intent, as cases cited in the Advisory Committee's Note on Rule 4 (a) (2) confirm. For example, in **Ruby v. Secretary of Navy**, 365 F2d 385 (CA9 1966), cert. denied, 386 US 1011 (1967), the appellant filed his notice of appeal **from an order of the District Court that dismissed the complaint without dismissing the action. The Court of**

Appeals determined that the ruling was not a final decision under sec. 1291, because the ruling left open an opportunity for the appellant to save his cause of action by amending his complaint. 365 F2d, at 387. Nonetheless, the court ruled that the notice of appeal from the **nonfinal ruling** could serve as a notice of appeal **from the subsequently filed final order dismissing the action."** (Emphasis added) (See **Firstier Mtge. Co. v. Investors Mtge. Co.,** 498 US 269, 275 (1991).

CONCLUSION

For all the foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted.

JESUS HERNANDEZ SANCHEZ
COUNSEL OF RECORD

OCTOBER 1994.